

**Transportation Management Corp. and General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction Employees Local Union 404, a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 1-CA-15846**

May 20, 1981

**DECISION AND ORDER**

On February 8, 1980, Administrative Law Judge Steven B. Fish issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge, as clarified herein, and to adopt his recommended Order,<sup>3</sup> as modified herein.

The Administrative Law Judge found, and we agree, that Respondent discharged employee Santillo in violation of Section 8(a)(3) and (1) of the Act. We arrive at that conclusion by applying to the facts of this case the test we have recently enunciated in our Decision in *Wright Line, Inc.*<sup>4</sup> In the application of this test, the first element to be determined is whether the General Counsel has established a *prima facie* case for the finding of a violation.

In this regard the General Counsel established by credible evidence that Santillo was a leading union activist and, in fact, was the one responsible for first contacting the Union. Respondent soon became aware of Santillo's role as union activist by its unlawful interrogation of employees. Thus, in a conversation between Respondent's manager, Patterson, and employee Baer, Patterson stated that he had heard that Santillo had started the Union and that he (Patterson) considered Santillo to be "two faced" and threatened to get even with him. In another conversation between Patterson and employee West, Patterson asked West, "What's with Sam and the Union" and Patterson promised to remem-

ber Santillo's union activity when Santillo wanted privileges.

The foregoing evidence establishes beyond doubt that Respondent had knowledge of Santillo's union activity and that it intended to retaliate against Santillo because of these actions. It also demonstrates that Respondent evidenced a strong union animus. Finally, Santillo was discharged the day after Patterson made his threat to "get even" with Santillo. In such circumstances, we find that the General Counsel has established by strong and credible evidence a *prima facie* case for finding that Santillo was discharged in violation of Section 8(a)(3) of the Act.

The only remaining question, therefore, is whether Respondent has shown, by other evidence, that Santillo's discharge would have occurred without regard to these considerations. Respondent offers three reasons to justify Santillo's discharge. The first is that he left the keys in his bus on the day of his discharge, which is a violation of company policy. The evidence shows, however, that it is a common practice among the drivers to leave the keys in their buses and, in Santillo's case, we have Patterson's admission that he had decided to discharge Santillo before he had any knowledge that the keys had been left in the bus. Accordingly, we conclude, as did the Administrative Law Judge, that this is nothing more than a purely pretextual reason which does more to detract from the lawfulness of the discharge than support it.

The second reason offered by Respondent was that Santillo was "stealing time" by taking unauthorized coffeekes. In this connection, the evidence shows that Santillo did in fact take coffeekes, but this was a normal practice among the drivers. The evidence further shows that such practices were tolerated unless these breaks affected the driver's ability properly to perform his job functions. In situations where the taking of such breaks adversely affected the driver's job performance, Respondent's practice was to change the driver's route, increase the number of children to be delivered, or refuse to pay the driver who was taking unauthorized time. In no such instance is there any evidence of disciplinary action being taken, much less any suspension or discharge.

The third and last reason relied on by Respondent was Santillo's practice of stopping off at his home before reporting at the garage which Respondent also characterized as "stealing time." The evidence establishes that Santillo, in fact, did engage in such a practice and there is no showing that Respondent either directly or indirectly condoned such a practice. On the other hand, when Respondent finally became convinced that Santillo

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> On the basis of *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), the broad order recommended by the Administrative Law Judge is not warranted. Accordingly, we shall modify the recommended Order in this respect.

<sup>3</sup> Member Jenkins would compute interest in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

<sup>4</sup> *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

was taking unauthorized time, Respondent did not confront him with the evidence or warn him of possible disciplinary action. Nor did Respondent follow its regular procedure of three written warnings before discharge.

On the basis of this evidence, we conclude that Respondent has failed to meet its burden of overcoming the General Counsel's *prima facie* case by establishing by competent evidence that Santillo would have been discharged, even absent his union activities. Accordingly, we find, in agreement with the Administrative Law Judge, that Respondent discharged Santillo in violation of Section 8(a)(3) and (1) of the Act.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Transportation Management Corp., Springfield, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(e):

"(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We intend to abide by the following:

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT discharge or otherwise discriminate against any employees to discourage membership in General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction Employees Local Union 404, a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against our employees because of their activities on behalf of or support for the Union or any other labor organization.

WE WILL NOT interrogate our employees regarding their activities on behalf of or support for the Union or any other labor organization.

WE WILL NOT create the impression among our employees that we have engaged in surveillance of their union or other concerted activities.

WE WILL NOT threaten our employees that we will get even with employees, or withdraw privileges or favors previously granted to employees, or otherwise retaliate against our employees, because of our employees' activities on behalf of or support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Sam Santillo immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL compensate him, with interest, for any loss of pay he may have suffered because we terminated him.

TRANSPORTATION MANAGEMENT CORP.

### DECISION

#### STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge: Upon a charge filed on March 28, 1979,<sup>1</sup> by General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction Employees Local Union 404, a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, the Regional Director for Region 1 issued a complaint and notice of hearing on May 9. The complaint alleges that Transportation Management Corp., herein called Respondent or the Compa-

<sup>1</sup> All dates are in 1979, unless otherwise stated.

ny, violated Section 8(a)(1) and (3) of the Act; by interrogating its employees concerning their union activity; by warning an employee that it would get even with another employee who was active on behalf of the Union; by creating the impression of surveillance of Union activity among its employees; and by discharging and refusing to reinstate its employee; Sam Santillo, herein called Santillo, because he joined and assisted the union.

Pursuant to notice, a hearing was held before me on October 4 and 5 in Northampton, Massachusetts. Briefs have been received from counsels for the General Counsel and Respondent, and have been duly considered.

Upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF RESPONDENT

Respondent, a Massachusetts corporation, maintains an office and place of business in Springfield, Massachusetts, where it is engaged in providing transportation services to various local school boards in the Commonwealth of Massachusetts. Respondent, annually, purchases gasoline and automobile products valued in excess of \$50,000, indirectly from points located outside the State of Massachusetts. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I accordingly conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. The Facts

Santillo began his employment at Respondent's Springfield location in October 1976 as a school bus driver. Of the 70 or so drivers employed at this location by Respondent, 3 or 4 employees were more senior than Santillo. Santillo began at a salary of \$2.30 per hour, and received various raises from 1976-79 to a salary of \$6.15 per hour.

On March 19, Santillo and employee John Walker went to the offices of the Union.<sup>2</sup> They spoke to union officials Eddie Lymon and John Adamski and discussed the possibility of sending union representatives down to the garage to speak to the drivers. Santillo signed an authorization card for the Union on that day.

Santillo then returned to work and spoke to six or seven other drivers about supporting the Union, and ascertained that these employees were interested. The next day, March 20, Santillo returned to the union hall and picked up 50-60 authorization cards to distribute to the employees. Santillo over the next several days distributed cards to and discussed the Union with a number of employees at the garage, in the parking lot, and some out-

side Respondent's premises, who live in Santillo's area. By March 23, Santillo testified that he had obtained seven signed authorization cards from Respondent's employees.

On March 22, George Patterson, Respondent's Springfield area manager, approached Joseph Baer, a driver and mechanic of Respondent, about 10 p.m. at the Train Stop in Holyoke, Massachusetts, where Baer was employed as a musician at night. According to Baer, this was the first time that Patterson had ever appeared where Baer was working at night. Patterson asked Baer if he had heard anything about the Union. Baer replied no, and the conversation ended.

The next night, March 23, Baer was performing at Lynn's Lounge in Chicopee, and Patterson again appeared. On this occasion Patterson told Baer that he (Patterson) heard that Santillo started the Union, called Santillo two-faced, and said that he was going to get even with Santillo. Patterson also complained to Baer about Santillo calling Patterson's girlfriend and trying to go out with her, and again stated that he would get even with Santillo.<sup>3</sup>

On the same evening, March 23, about 7 p.m., at Respondent's terminal, Patterson had a conversation with Ed West, a driver, who is the brother-in-law of Santillo. Patterson asked West, "What's with Sam and the Union?" West replied that he did not know anything about it, except that Sam had a lot of people complaining to him and that Sam just wanted to help them. Patterson replied that he was taking it "personal" and referred to the fact that Patterson had permitted Santillo to park his car in Patterson's yard and had allowed Santillo to take time off from work in the summer to go to another job.<sup>4</sup> Patterson added that when Santillo wanted such favors again, "I'll remember it."<sup>5</sup>

West on that evening went home and told Santillo of his conversation with Patterson.

The next morning, March 24, around 11 a.m., Santillo called Patterson at Respondent's premises. Santillo told Patterson that West had informed him that Patterson was taking it personally, and that he wanted Patterson not to take it personally. He went on to say that he still felt that Patterson was his friend and that it was really between the Union and TMC. Santillo added that he understood Patterson's position, being manager, but that in Santillo's view, "you and I are out of the picture." Patterson answered that he understood, and that when Santillo explained this union thing to the drivers, that he should make sure to explain to them what the rates really were. Santillo replied that he was accurately informing the employees about the rates of pay, and that he was just telling them that the Union was possibly coming to talk to

<sup>3</sup> These findings are based on the undenied testimony of Baer, which I credit.

<sup>4</sup> Apparently, Santillo had a job running a stand at the fair in the summer and was permitted by Patterson to leave early for this purpose.

<sup>5</sup> These findings are based on the testimony of Ed West. Patterson testified that he recalls a conversation with West on that evening, but does not recall anything that was said, other than that the subject of the Union was not mentioned. I credit the testimony of West since I found him to be a believable and forthright witness, and particularly since Patterson could not recall any part of the conversation.

<sup>2</sup> Prior thereto, employees had been complaining among themselves about various problems on the job, such as gassing up on their own time, and time going from their home to pick up children being unpaid time.

the employees. Patterson concluded the conversation by saying that when Santillo came in on Monday morning that he (Patterson) was going to have to pretend in front of other employees that he was mad at Santillo.

Patterson testified that he was rather upset at the time of this conversation. When asked what he was upset about at the time, Patterson responded, "I was upset about the time and the union, being in about my 70th hour of work. I was pretty much upset at that time."

On that same Saturday morning, March 24, Patterson had a further conversation with employee Baer at the garage.<sup>6</sup> Patterson asked Baer if he had signed a union card. Baer denied that he had signed. Patterson then told Baer about the time that he had some dealings with the Union and how they had "screwed" him. Patterson then went into his office and came out a few minutes later. He then told Baer that he was not supposed to ask any questions about the Union. Baer replied that he could have told Patterson that. Patterson asked why Baer had not told him and then told Baer not to mention anything about the conversations they had about the Union.

These findings are based on the undenied testimony of Baer, which I credit. Patterson, although he did not testify concerning any conversations with Baer, did indicate that either on Friday night or Saturday, he was briefed by Respondent's vice president, Sullivan, on his obligations under Federal law with respect to discussing the Union with employees. This tends to reinforce Baer's testimony that he was told by Patterson that the latter was not supposed to ask any questions about the Union. Patterson admitted that he had questioned several drivers about the Union. The only specific employee that he recalled asking was driver David Stebbins. Patterson admitted that he asked Stebbins if he knew anything about the Union and Stebbins replied yes and that he had in fact signed a card and was for the Union. Patterson then asked why he was for the Union and Stebbins responded that it takes a giant to fight a giant. Patterson then added that he could see that point, but asked Stebbins if he ever had any problems with this organization as far as grievances go. Stebbins replied no.

Patterson also testified in response to a question from his attorney that prior to Santillo's discharge, he Patterson, was aware of the fact that about 22 other employees (including Baer and West) were also in favor of the Union. His knowledge according to Patterson, with the exception of Stebbins, came from discussions with other employees, in all cases initiated by the employees themselves. However, on cross-examination Patterson could not recall which employees had told him about the union activities of the employees named, nor any details about any of the conversations.

Patterson also admitted that he was aware of Santillo's union activities sometime prior to March 26. At first Patterson testified that his first knowledge of Santillo's activities came during the phone conversation that he had with Santillo on March 24, in which Santillo told him not to take it personally. Patterson later changed his testimony on this issue, and said that he had been told unso-

licited by one or two employees that Santillo had approached them and was talking about the Union. He also testified that he was unaware that Santillo had any leadership role in the Union's organizational activities at Respondent's premises.

I find Patterson's testimony in this area to be highly dubious and unworthy of credence.

Since I have already credited Baer and West that Patterson interrogated them about union activities, during which Santillo's union activities in particular were discussed, and Patterson accused Santillo of having started the Union, and since I find it incredible to believe that 22 employees would approach Patterson and unsolicited tell him about union activities of others, as well as Patterson's own admission that he did recall specifically interrogating one employee, and his earlier testimony that he also asked several others about union matters, and the fact that he admits being told by higher management on March 24 that under the law he should not be asking employees about the Union, I find that during the week prior to Santillo's discharge on March 26 Patterson conducted an extensive campaign of interrogating a number of employees about their union activities, during which he ascertained that Santillo was one of the prime organizers of the union campaign.

On Saturday, March 24, Santillo called about 70 drivers on the phone, and informed them of a union meeting to be held on Monday, March 26, at 6 p.m., at the union hall on Chestnut Street.

On Monday, March 26, union officials Lymon and Adamski were outside Respondent's premises distributing leaflets, announcing the union meeting to be held that evening. Santillo, about 9:30 a.m., stopped and spoke to the union officials for a period of about 15 minutes. There is no evidence in the record that any management officials saw Santillo speaking with these union officials. Patterson admits that he saw the union officials distributing leaflets on that day and that he read them and was therefore aware that a union meeting was scheduled to be held that evening. Patterson denies that he observed or was aware of Santillo talking to the union officials while the leaflets were being distributed. The General Counsel characterizes Patterson's testimony in this regard as "impossible to believe," and urges that Patterson be found to have been aware of Santillo's speaking to the union officials while leaflets were being distributed. Although, it can be surmised that Patterson may have observed or been made aware of this activity by Santillo, I find that it is also conceivable that Patterson did not happen to look out at the union officials leafletting during the 15-minute period that Santillo was talking with them. Accordingly, I find the record insufficient to establish that Respondent was aware of this activity on the part of Santillo on March 26.

Later on in the day, Santillo was called into Patterson's office. Present were Patterson, Santillo, and Russell Van Horn, Respondent's supervisor. Patterson informed Santillo that he was being fired for leaving his keys in the bus, and taking unauthorized breaks. Santillo asked for the reasons in writing and Patterson told him to wait outside while he called the main office. Patterson then

<sup>6</sup> The record does not establish whether or not this conversation was before or after Patterson's phone conversation with Santillo.

called the office and spoke to Richard Zimmerman, Respondent's president. Patterson informed Zimmerman of the fact that he had terminated Santillo, and told him that Santillo was interested in the Union, and that Santillo had asked for the reasons for discharge in writing. Zimmerman affirmed the action of discharge and instructed Patterson not to give Santillo any reasons in writing. After the phone call, Patterson informed Santillo that he should leave the premises immediately and that he was officially fired. Santillo replied that he was not going to let this rest and that he planned on fighting the action. Patterson then added, "By the way this has nothing to do with the Union." As Santillo was leaving, Van Horn said to Patterson that he thought that Respondent was nuts or crazy for letting Santillo go at that point in time, because of the union meeting that night as they would make a "mountain" out of Santillo.<sup>7</sup>

Patterson explained that the main reason for his decision to terminate Santillo was Santillo's alleged "stealing time," and that the failure to put his keys on the rack was a subsidiary additional reason for his action.

The stealing time allegation relates to the practice engaged in by Santillo of taking a coffeebreak in the mornings while between routes, and Santillo's stopping at his house for about 15 minutes per day on the way back to the garage before reporting in and punching out. Since Santillo was on the clock and being paid for the times that he was taking a coffeebreak and stopping at his house, Patterson testified that he considered this conduct to be stealing time from Respondent. The facts are not in dispute that Santillo did in fact take a coffeebreak every morning, and that he also stopped each day at his home for about 15 minutes before coming into the garage. There is much dispute, however, with respect to company policy and warnings concerning these areas.

Patterson asserts that sometime in November 1978 he spoke to Santillo about taking coffeebreaks, after he had received a complaint about it from Maloney of the school department about Santillo stopping while children were on his bus to buy coffee. According to Patterson he told Santillo at that time that he should not be taking coffeebreaks, and that Santillo responded that he did not know it was wrong and promised not to do it again. Santillo recalls the conversation, but contends that the discussion only related to Santillo drinking coffee while he was transporting children, and that he agreed not to do this again. However, Santillo denies ever being told then or at any other time that coffeebreaks in general were improper procedure. I credit Santillo's version of this conversation, particularly since Patterson when first asked about this discussion when examined by the General Counsel under Section 611(c) of the Federal Rules, testified that the conversation had been restricted to Santillo driving the bus with coffee in his hand.

<sup>7</sup> The above remarks of Van Horn are based on the testimony of Santillo which I credit since they were undenied by Patterson, and Van Horn did not testify. Patterson denied that he brought up the fact that the discharge had nothing to do with the Union, but stated that Santillo brought the subject up and he merely denied it. I credit Santillo on this point. In addition to demeanor considerations, I rely on the fact that Van Horn also mentioned the discharge at the time, in connection with the Union and Santillo's activities on its behalf.

Santillo testified that he was unaware of any company rule or prohibition of coffeebreaks in general. Employees Nancy Danko, Ed West, and Joseph Baer, all testified that they were unaware of any company rule prohibiting coffeebreaks, that they in fact had taken coffeebreaks as a matter of course and had seen numerous other employees take such breaks, and had never been spoken to or warned about it by management. Danko testified, in fact, that she had on occasion brought back coffee to Patterson. Further, Respondent's driver information booklet, introduced into evidence, makes no reference to any company rule regarding coffeebreaks.

Employee Lee Holmes testified that he was spoken to about coffeebreaks by Patterson, but that Holmes explained to Patterson the reason that there was a problem on his run was not the coffeebreaks that he was taking, but due to the number of children on his run. Thereafter Holmes' run was changed and his route was rearranged. Although this change in route did reduce the amount of time Holmes was able to take for coffeebreaks, he testified that he did thereafter take some coffeebreaks and was always paid for the time during which he took these breaks.

Patterson's testimony concerning company practice with respect to coffeebreaks was confusing and contradictory. Initially, he testified that no coffeebreaks were permitted, stating, "They are getting paid to pick up kids, that is what they should be doing." Upon further cross-examination, however, Patterson admitted that in some situations coffeebreaks are permitted and in others they are not. Patterson was unable to specify clearly in which situations coffeebreaks were authorized. However, he appeared to be saying that coffeebreaks are allowed unless they in some way result in an adverse effect on the servicing of the driver's route. Patterson also testified that when the Company finds out about these unauthorized coffeebreaks the normal practice is to change the driver's route, or give him more children to pick up, or to tell the driver to leave the garage later or simply not to pay the driver for the time spent while on coffeebreaks.

I find, based on the evidence as summarized above, that the taking of coffeebreaks by Respondent's employees was a common occurrence, and that Respondent's officials knowingly tolerated this activity without question, unless the coffeebreaks resulted in the drivers arriving too late or too early at their stops, or otherwise inconvenienced the children being transported. I also find that on those occasions when Respondent discovered that the taking of coffeebreaks produced such a result, they would alleviate the situation by changing routes, increasing the number of children to be transported, changing the time a driver would leave the garage, or merely not paying the driver for the time.

With respect to Santillo stopping at his home in the afternoons before going back to the garage, Patterson testified that sometime in late February he received an anonymous call complaining about Santillo's bus being parked every day on Alcorn Drive. Patterson spoke to employees Kelly and Saderopolis, who live on Alcorn Drive, and confirmed the fact that Santillo had been

parking his bus every day for some 15 minutes in the afternoon between 5 p.m. and 5:20 p.m. Patterson testified that he asked Santillo if he was stopping his bus at his home before coming back to the garage. Santillo allegedly denied that he was stopping, and informed Patterson "every minute that bus is out of this garage it is rolling."

Santillo, although admitting that he regularly stopped off at his home for 15-20 minutes before returning to the garage, denied ever being spoken to or asked about it by Patterson. Santillo explained that he stopped at his home in order to go to the bathroom. Santillo admitted that he was aware that he was not authorized by Respondent to take the bus home before reporting in, but attempted to justify his actions by pointing out that Respondent failed to pay employees for time spent gassing up before taking the bus out. Thus, in Santillo's mind his stopping at home was to make up for the failure of Respondent to pay him for the gassing up time. I credit Patterson on the issue of whether Santillo was spoken to about this problem. I find it reasonable that Patterson after finding out about Santillo's behavior would mention it to him. I also find that Santillo denied making these stops because in his mind he was justified in doing so because Respondent unfairly refused to pay him for his gassing up time. I note, however, that Patterson admitted and I so find that he at no time confronted Santillo with the confirmation that he had obtained from employees that Santillo was engaging in this conduct, and that he at no time warned Santillo that he would or might be subject to any kind of disciplinary action, much less discharge, if he continued to make these stops at home.

The remaining ground for Santillo's discharge according to Patterson was Santillo's leaving keys in his bus. Patterson asserts that Santillo had a habit of leaving his keys in the bus, and that he Patterson had spoken to Santillo about it on a number of occasions and warned him not to leave his keys in the bus. Patterson did not enumerate when these conversations occurred, but testified that he told Santillo that as it was turning to spring, Respondent was leaving the garage opened and that he did not want any of the buses disappearing. Patterson also testified that garage dispatcher Ronald Sulloway warned Santillo about leaving the keys in the bus on Thursday or Friday, March 22 or 23.

Sulloway testified as Respondent's witness and, despite extensive attempts by Respondent's counsel to lead him into corroborating Patterson on this point, denied that he had warned Santillo about leaving keys in the bus on the Thursday or Friday before his discharge. Sulloway testified that he did speak to Santillo 3 weeks before the discharge about leaving keys in the bus. According to Sulloway, Santillo responded by saying that he did not have to listen to Sulloway and Sulloway was "the bosses' ass wiper." Sulloway further testified that he reported to Patterson that he had told Santillo not to leave his keys in the bus anymore, and Patterson replied, "O.K., you told him. We'll let it go. If it happens again we'll write him up."<sup>8</sup>

<sup>8</sup> According to Sulloway Respondent has a system of written warnings which are issued to employees and after three warnings it is cause for

Sulloway further testified that on the day of Santillo's discharge, March 26, he again noticed Santillo leaving his keys in the bus. Sulloway alleges that he told Santillo that he had been warned before about the problem and this time he would have to write Santillo up. Again, Santillo allegedly said, that he did not have to listen to Sulloway. Sulloway alleges that he had reported the matter to Patterson in the morning and Patterson told him to speak to Santillo about it and he did so.

Patterson on the other hand did not mention Sulloway reporting this problem to him on March 26 or even discussing the matter with him on that date. Patterson testified that while Santillo was out on his morning run he made up his mind to discharge him, and that he intended to inform him when he returned to the garage from his run and brought his keys into the office. However, Santillo left the keys in the bus and went directly home without coming into the office. Therefore Patterson, when he found out that Santillo was not there, called him at home and told him to come in, and informed him of his discharge when he returned to the garage.

Santillo denied ever being warned or spoken to about leaving keys in the bus. Santillo admits that he would leave his keys in the bus while in the garage in between runs, but after his runs were complete he would put the keys on the key rack in the office. He also testified that he has frequently seen other employees leave their keys in the bus. Nancy Danko testified that she would leave her keys in the bus from time to time and that she was never spoken to about it or made aware by Respondent's officials that there was any rule against it.

I credit Santillo that he was never warned about this alleged problem and that there is no established company rule prohibiting such conduct. Danko substantially corroborates Santillo's testimony, while the testimony of Sulloway and Patterson is filled with contradictions and inconsistencies on the subject.<sup>9</sup>

Patterson testified at length concerning his decision to discharge Santillo. He alleges that when Santillo, in late February, denied that he was stopping at home on the way back to the garage, he was suspicious and skeptical of such denials. Thus, he ordered a new tacograph to be placed in Santillo's bus, which would measure the amount of time that his bus was in operation and when it was stopped. The new tacograph was installed in his bus on March 12.<sup>10</sup>

dismissal. Patterson denied that Respondent has any kind of system of written warnings.

<sup>9</sup> Thus, Patterson testified that Sulloway warned Santillo about leaving his keys in the bus on the Thursday or Friday before the discharge. Sulloway denied issuing such a warning but claims that he warned Santillo about 3 weeks before. Sulloway also testified that he noticed Santillo's leaving the keys in the bus on the day of his discharge, March 26, reported it to Patterson, who told him to speak to Santillo about it. Patterson makes no mention of this incident, and claims that he made up his mind to discharge Santillo before finding out his keys were left in the bus on March 26. Moreover, Sulloway testified that in both conversations relating to this subject he talked about issuing warning notices to Santillo in connection with Respondent's system of three written warnings before a dismissal. Patterson denies that Respondent has any system of written warnings prior to dismissal.

<sup>10</sup> The installation of tacographs on buses is not an unusual procedure. In fact most other buses contained such an instrument and Santillo's bus itself contained a tacograph, but it was not properly functioning.

The first week's reading according to Patterson measured only 2 days of the week. Although these 2 days demonstrated that Santillo had been taking breaks and stopping at home, Patterson did not take any action against Santillo, as he asserts that the graph was still incomplete. When asked why he did not bring the initial readings to Santillo's attention, Patterson testified at first that he was looking for evidence to fire him. Patterson then, after being asked if he had determined to fire Santillo, answered, "No, I had determined to confront him with both his denials of the stops and the tacograph readings."

Patterson further testified that on Friday, March 23, he reviewed the tacographs and discovered gaps in time of 15 minutes in the morning and 15 minutes in the afternoon. According to Patterson it was in his mind at that time to discharge Santillo, but he had not finally made the decision. On Saturday, Patterson was in the office, but asserts that he did not look at the tacograph on that day. When asked why he did not do so, his response was that it did not occur to him on Saturday. On Monday, March 26, Patterson claims, that as part of his regular routine of reading all the tacographs, he read Santillo's graphs. He then discovered that for the previous week, Santillo actually worked 6 hours per day, while putting in for 6-1/2 hours per day. This confirmation of the fact that Santillo was "cheating" on his time according to Patterson persuaded him that Santillo should be immediately discharged. He claims that he discussed the matter with Supervisor Van Horn and his girlfriend, and they both concurred that Patterson should be discharged.<sup>11</sup> Patterson denied that he consulted with Zimmerman or any other superiors in the main office or elsewhere about his decision to terminate Santillo.

## B. Concluding Findings

### 1. The 8(a)(1) allegations

The evidence establishes that Respondent engaged in several violations of Section 8(a)(1) of the Act as alleged in the complaint.

The statements made by Patterson to Baer, that he (Patterson) heard that Santillo had started the Union, that Santillo was two-faced, and that he was going to get even with Santillo, constitute unlawful threats of reprisals as well as create the impression of surveillance of employees' union activities.

Respondent urges with respect to these remarks that the evidence is not clear that the "getting even" referred to any union activity and that it concerned a private situation between Santillo and Patterson not relating to Company-granted privileges. Although Baer's testimony does indicate that the subject of Santillo having attempted to date Patterson's girlfriend did arise in their conversation in connection with Patterson getting even with Santillo, it is also clear that Patterson did say that Santillo started the Union, was two-faced, and Patterson was going to get even with him. The fact that Patterson did not testify concerning this conversation further rein-

forces my belief that the "getting even" remarks did relate, at least in part, to the union activities of Santillo, and I so find.

Having so concluded, such a remark has been held to be a direct and unambiguous threat by a man who could deliver on it, and constitutes a violation of Section 8(a)(1) of the Act.<sup>12</sup>

Respondent contends that the record is devoid of any evidence to sustain the allegation in the complaint concerning Respondent creating an impression of surveillance of union activities. I disagree. Patterson's remark to Baer that he heard that Santillo started the Union reasonably tends to impress upon employees that the Company maintained surveillance of union of said employees, including possibly his own, and constitutes a violation of Section 8(a)(1) of the Act.<sup>13</sup>

Patterson's comments to West, after ascertaining from West that Santillo was interested in the Union, that he would "remember" Santillo's union activities when Santillo asked him again for certain favors that Patterson had granted to Santillo, I find to be implied threats of reprisals in violation of Section 8(a)(1) of the Act.

Respondent contends again that the matter concerns a private matter between Patterson and Santillo, not involving Company-granted privileges. However, the evidence is to the contrary, as one of the favors mentioned by Patterson was his practice of permitting Santillo to leave early from his job, in order to enable Santillo to be present at his other job running a stand at the fair. Thus, I find, Patterson threatened to withdraw his previously granted privilege of adjusting Santillo's work schedule to accommodate his other job, in reprisal for his union activities, in violation of Section 8(a)(1) of the Act.<sup>14</sup>

Moreover, I find that Patterson's implied threat to withdraw his permission for Santillo to park his personal truck in Patterson's driveway is also violative of the Act, even though not involving Company-granted privileges. Although Section 8(a)(3) of the Act requires discrimination in employment in order for the action to be violative of the Act, Section 8(a)(1)'s prohibition of restraint and coercion does not require that the restraint or coercion relate to a term or condition of employment. As long as the threat is found to be in reprisal for an employee's union activities, such a threat is in violation of Section 8(a)(1) of the Act.<sup>15</sup>

<sup>12</sup> *The Goodyear Aerospace Corporation*, 234 NLRB 539 (1978); See also *E. Mishan & Sons, Inc.*, 242 NLRB 1344 (1979); *Richard Tischler, Martin Bader and Donald Connelly, Sr., a Limited Partnership d/b/a Devon Gables Nursing Home, et al.*, 237 NLRB 775 (1978); *Pittsburgh Press Company*, 234 NLRB 408 (1978).

<sup>13</sup> *Jim Baker Trucking Company*, 241 NLRB 121 (1979); *Brown Manufacturing Corporation*, 235 NLRB 1329 (1978); *James Innaco, d/b/a Skline Transport*, 228 NLRB 352 (1977); *Commerce Concrete Company, Inc.*, 197 NLRB 658 (1972); *American National Stores, Inc.*, 195 NLRB 127 (1972).

<sup>14</sup> *Vincent's Steak House, Inc.*, 216 NLRB 647 (1975).

<sup>15</sup> See, for example, *Harold Jackson, a sole proprietor, d/b/a Truck and Trailer Service*, 239 NLRB 137 (1978), where a threat to evict an employee from a house rented from a principal of the employer was found to be a violation, although the rental was not a company related privilege. See also *Kent Brothers Transportation Co.*, 188 NLRB 53 (1971), and *E. M. Mishan, supra*, where threats of bodily harm to union instigators were found to be violative of the Act.

<sup>11</sup> According to Patterson, his girlfriend had worked with Santillo for 2 years and she knew Santillo and what was going on. Her opinion allegedly was that Santillo should have been fired long ago.

Although Patterson admits interrogating employees concerning their union activities, Respondent contends that these incidents were isolated, casual, and friendly in nature, and should not be found violative of the Act. I conclude, on the contrary, that Patterson's questioning, coupled with the unlawful threats of reprisals and statements creating the impression of surveillance, was far from casual, isolated, or friendly, and constitutes coercive interrogation in violation of Section 8(a)(1) of the Act.

## 2. Discharge of Santillo

The evidence establishes a strong *prima facie* case of discrimination against Santillo because of his union activities. All of the elements necessary for the finding of a violation are clearly present. Thus, Santillo was one of the prime organizers for the Union, and Respondent was aware of this fact.<sup>16</sup> In addition, Respondent while asking about Santillo's union activities, and creating the impression of surveillance of employees' union activities, called him two-faced, said that he was taking it personally, threatened that he would "get even" with Santillo, and threatened to withdraw favors he had previously been granting to Santillo. Thus, union animus has clearly been established. Finally, the timing of the discharge on March 26, coming on the next working day after the unlawful threats described above, and on the very day that a union meeting was scheduled for that evening and where Respondent was aware of the meeting being scheduled by virtue of having read the leaflets distributed by union officials on that day to employees announcing the meeting, is highly indicative of a discriminatory motivation.

Respondent's asserted reasons for the discharge of Santillo fail to withstand scrutiny, and further tend to reinforce the conclusion that Santillo's discharge was unlawful. Santillo's having left his keys in the bus is clearly a pretextual reason, as by Patterson's own testimony he had made up his mind to discharge Santillo before finding out that he left his keys in the bus, on March 26, and I have found the leaving of keys in buses to be common practice at Respondent. Moreover, as noted above, the record reveals serious inconsistencies between the testimony of company officials Patterson and Sulloway on this subject.

Respondent contends that the primary reason for the discharge was Santillo's alleged "stealing of time," by virtue of his unauthorized coffeekbreaks and his stopping off at his home before reporting into the garage. There is no question that Santillo was taking coffeekbreaks and stopping at his home before coming in. I have found, as noted, that the taking of coffeekbreaks by employees was normal practice, and that Respondent tolerated this practice without taking any kind of action unless the breaks

interfered with a driver's route being properly performed. Moreover, I have found that, in situations where such coffeekbreaks have resulted in such an effect on a driver's route, Respondent would take such actions as changing a driver's route or the time that he left the garage, increasing the number of children to be delivered, or simply not paying the driver for this "unauthorized" time. In no case does the record reveal a discharge, suspension, or any other kind of disciplinary action taken against employees for engaging in such conduct.

Although an argument can be made that Santillo's stopping at home before coming back to the garage can be differentiated from the taking of coffeekbreaks, and is a more serious transgression, I note that Respondent considered this conduct to be but another example of Santillo's taking unauthorized breaks and alleged by "stealing" time.

I deem it significant that, even in Patterson's version of the facts, he never cautioned or admonished Santillo that his taking coffeekbreaks or his stopping at home might lead to his dismissal or any other disciplinary action. Such an action on the part of an employer is not natural, and the failure to issue such a warning is indicative of discriminatory motivation.<sup>17</sup> In fact, Patterson's own testimony also establishes that when he first became aware of the tacograph's establishing that Santillo was stopping at home in the evening (before his union activities) he had not determined to fire him, but had determined to confront him with both his denials of the stops and the tacograph readings. Yet when the tacograph readings in the next week further confirmed Santillo's stopping at home (after his union activity), Patterson did not as he intended to do, confront Santillo with his evidence, nor warn him of future disciplinary action. He also did not take any of the actions normally taken by Respondent when unauthorized breaks were found to have affected drivers' runs, such as changing routes or times, or increasing the number of children or not paying the driver for the time.<sup>18</sup>

Moreover, Respondent's own witness and garage dispatcher, Sulloway, testified that the Company utilized a procedure of three written warnings before discharge. Yet no such written warnings were ever issued to Santillo. This further tends to buttress my conclusion that, prior to the union activities of Santillo, Respondent did

<sup>17</sup> *Savin Business Machines Corporation*, 242 NLRB 82 (1979); *Laredo Packing Company*, 241 NLRB 184 (1979); *Lammert Industries, a Division of Componentrols, Inc., a Subsidiary of I-T-E Imperial Corporation*, 229 NLRB 895 (1977); *The May Department Stores Company, d/b/a The May Company*, 220 NLRB 1096 (1975).

<sup>18</sup> There was no probative evidence presented that any of Santillo's unauthorized time resulted in any detriment to the drivers' runs. Patterson on cross-examination for the first time mentioned that his reading of the tacograph revealed that Santillo had been dropping some children off early. However, Patterson admitted that no complaints were received about Santillo doing this, and that he never had any discussions with Santillo about this subject. I find that this was but a contrived attempt by Patterson to establish that Santillo's breaks were in fact having an adverse effect on his route. In any event, even if Patterson's testimony was to be credited in this regard, as noted, Respondent's normal procedures in these circumstances were not followed.

<sup>16</sup> Respondent's contention that Patterson, although aware that Santillo was a union supporter, was not aware of his leadership role in the Union is contradicted by the evidence of record. It is undisputed that Patterson told Baer that he heard that Santillo had started the Union, and that he asked West "what's with Sam and the Union" and West confirmed Santillo's leadership role in the Union. Accordingly, it is clear that Patterson was fully aware that Santillo was a leader of the union organizing drive among its employees.



not consider his conduct so serious as to warrant his discharge.<sup>19</sup>

I conclude that a preponderance of the evidence establishes that Patterson's decision to discharge Santillo on March 26 was in furtherance of his threat made on March 23 to get even with Santillo for his union activities, and was motivated by a desire to discourage union activities in violation of Section 8(a)(1) and (3) of the Act.

I am mindful of the fact that Santillo did engage in what might be considered unsatisfactory conduct. In other circumstances, it is reasonable to assume that some employers would consider such conduct to be serious enough to justify discharge. In particular, I refer to Santillo's stopping at home before going back to work while being aware that he was not authorized to do so, and denying to Respondent that he was engaging in such conduct. However, I am persuaded that, based on the record as a whole, the evidence is sufficient to establish that this Respondent would not have fired Santillo, one of his most experienced employees, but for his union activities, but rather would have confronted him with Respondent's evidence (as Patterson testified that he intended to do), warned him of possible future discipline, and/or taken any of the actions normally taken by Respondent where unauthorized breaks were discovered.<sup>20</sup> Therefore, Respondent has violated Section 8(a)(1) and (3) of the Act.<sup>21</sup>

#### CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their activities on behalf of and their support for the Union.
4. Respondent has violated Section 8(a)(1) of the Act by creating the impression among its employees that Respondent has engaged in surveillance of their union or other concerted activities.
5. Respondent has violated Section 8(a)(1) of the Act by threatening employees that it would get even with them, or withdrawing privileges or favors previously granted to employees, because of its employees' activities on behalf of and support for the Union.
6. Respondent has violated Section 8(a)(1) and (3) of the Act by discharging and refusing to reinstate Sam

Santillo because of his activities on behalf of and support for the Union.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist from engaging in such unfair labor practices and take certain affirmative action as provided in the recommended Order below, designed to effectuate the policies of the Act.

Respondent will be required to offer Sam Santillo immediate reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges. I shall further recommend that Respondent make Santillo whole for any loss of earnings he may have suffered by reason of the unlawful discharge, with backpay to be computed on a quarterly basis, making deductions for interim earnings, and with interest to be paid on the amounts owing and to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>22</sup>

Upon the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>23</sup>

The Respondent, Transportation Management Corp., Springfield, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
  - (a) Discharging or otherwise discriminating against its employees because of their activities on behalf of and support for the Union or any other labor organization.
  - (b) Interrogating its employees regarding their activities on behalf of or support for the Union or any other labor organization.
  - (c) Creating the impression among its employees that Respondent has engaged in surveillance of their union or other concerted activities.
  - (d) Threatening its employees that it will get even with employees, or withdrawing privileges or favors previously granted to employees, or otherwise retaliating against its employees, because of its employees' activities on behalf of or support for the Union.
  - (e) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.
2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

<sup>19</sup> *Keller Manufacturing Company, Inc.*, 237 NLRB 712 (1978).

<sup>20</sup> Respondent places great reliance on the fact that Patterson ordered the tachograph placed in Santillo's bus prior to his engaging in any union activities. However, the record reveals that it was not an unusual procedure to have such instruments in buses. In fact, most of Respondent's buses contained tachographs and in fact Santillo's bus also had such an instrument, but it was not working properly. Although, it is clear that Patterson was disturbed by Santillo's behavior prior to his union activities, I conclude that his leadership role in the union activity triggered Patterson's decision to terminate him on March 26, without confronting him with evidence of his malfeasance, warning him of possible discipline, or taking other action normally taken by Respondent in similar circumstances.

<sup>21</sup> *Keller Mfg. Co.*, *supra*; *Savin Business Machines Co.*, *supra*; *Laredo Packing Co.*, *supra*; *Adams Delivery Service, Inc.*, 237 NLRB 140 (1978); *Coletti's Furniture Inc. v. N.L.R.B.*, 550 F.2d 1292 (1st Cir. 1977).

<sup>22</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>23</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Offer to Sam Santillo immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve, and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payroll records, timecards, personnel records and reports, and all other records necessary, or appropriate, to analyze the amount of backpay due.

(c) Post at its place of business in Springfield, Massachusetts, copies of the attached notice marked "Appendix."<sup>24</sup> Copies of the notice, on forms provided by the

Regional Director for Region 1, after being duly signed by Respondent's authorized representative, shall be posted by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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<sup>24</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by

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Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."